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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

REBECCA ALICIA WINDER,

Defendant and Appellant.

A125543

(Sonoma County
Super. Ct. No. SCR551844)

Rebecca Alicia Winder entered a no contest plea to 35 counts of second degree burglary and was sentenced to a prison term of 12 years and 4 months. She contends that a recent amendment to Penal Code¹ section 4019, which increased the number of pretrial conduct credits available to eligible defendants, should be applied retroactively to her sentence. We agree, and therefore order the judgment amended to reflect the additional credits to which defendant is entitled under the amended statute.

DISCUSSION

The changes to section 4019 were effective January 25, 2010. (§ 4019, as amended by Stats. 2009, ch. 28, § 50 (Sen. Bill No. 18 (2009-2010 3d Ex. Sess.).) Although defendant was sentenced before the changes took effect, her sentence is not yet final for purposes of determining whether the amended statute should apply to her case.

¹ All further statutory references are to the Penal Code.

(See *People v. Vieira* (2005) 35 Cal.4th 264, 306.) Our review of this legal issue is de novo. (*In re Chavez* (2004) 114 Cal.App.4th 989, 994.)

When defendant was sentenced, section 4019 provided for two days of conduct credit for every six-day period in custody. (Former § 4019, subds. (b) & (c), (f).) She was credited with 176 days of actual custody credit and 88 days of conduct credit pursuant to section 4019, for a total of 264 days. As amended, section 4019 now allows eligible defendants to earn two days of conduct credit for every four days of actual custody. (§ 4019, subds. (b) & (c); *People v. Dieck* (2009) 46 Cal.4th 934, 939.) Moreover, eligible defendants may ultimately earn two days of credit for every two days actually served: “It is the intent of the Legislature that if all days are earned under this section, a term of four days will be deemed to have been served for every two days spent in actual custody. . . .” (§ 4019, subd. (f).) The new credit ratios are not available to defendants who are required to register as sex offenders or were convicted of serious or violent felonies (§ 4019, subds. (b)(2) & (c)(2)), and conduct credits earned by defendants convicted of violent felonies are limited to 15 percent of actual confinement time. (§ 2933.1.)

Despite the recent vintage of the amendment to section 4019, we are by no means the first appellate court to address the question of its possible retroactive application. As of this writing, the issue has been the subject of published opinions by the Sixth Appellate District in *People v. Hopkins* (2010) 184 Cal.App.4th 615, the Fifth Appellate District in *People v. Rodriguez* (2010) 183 Cal.App.4th 1, the Third Appellate District in *People v. Brown* (2010) 182 Cal.App.4th 1354, by our colleagues in Division Two of the First Appellate District in *People v. Landon* (2010) 183 Cal.App.4th 1096, Division One of the Second Appellate District in *People v. House* (2010) 183 Cal.App.4th 1049, and our panel in *People v. Norton* (2010) 184 Cal.App.4th 408.² While *Rodriguez* and

² *People v. Hopkins* and *People v. Norton* are not yet final. (See Cal. Rules of Court, rule 8.264(b).)

Hopkins hold the amendment applies only prospectively, *Brown, Landon, House* and our decision in *Norton* hold it applies retroactively to all convictions that were not final on its effective date.

We will apply section 4019 retroactively in this case. Although penal statutes are generally presumed to operate prospectively unless the Legislature has specified, or at least clearly implied, retroactive application (§ 3; *People v. Alford* (2007) 42 Cal.4th 749, 753), in *In re Estrada* (1965) 63 Cal.2d 740, our Supreme Court delineated an exception to this general rule for statutory amendments that lessen punishment. As explained in *House*, the *Estrada* rule “is based on a consideration that the California Supreme Court has described as ‘of paramount importance: “When the Legislature amends a statute so as to lessen the punishment, it has obviously expressly determined that its former penalty was too severe and that a lighter punishment is proper as punishment for the commission of the prohibited act. It is an inevitable inference that the Legislature must have intended that the new statute imposing the new lighter penalty now deemed to be sufficient should apply to every case to which it constitutionally could apply.” [Citations.]’ [Citation.] Thus, ‘*Estrada* stands for the rule that when the Legislature amends a statute for the purpose of lessening the punishment, in the absence of a clear legislative intent to the contrary, a criminal defendant should be accorded the benefit of a mitigation of punishment adopted before his criminal conviction became final.’ ” (*People v. House, supra*, 183 Cal.App.4th at p. 1056; see also *People v. Rossi* (1976) 18 Cal.3d 295, 299-300; *In re Chavez, supra*, 114 Cal.App.4th at p. 999.)

Section 4019, as amended by Senate Bill No. 18, contains neither a savings clause nor an explicit indication of legislative intent regarding retroactivity, but it lessens punishment by increasing the number of credits eligible prisoners can earn for good behavior. (*People v. Landon, supra*, 183 Cal.App.4th at p. 1105; *People v. Doganiere* (1978) 86 Cal.App.3d 237, 239-240 [holding amendment that authorizes conduct credit applies retroactively]; *People v. Hunter* (1977) 68 Cal.App.3d 389, 393 [amendment

authorizing actual custody credits applies retroactively].) Pursuant to *Estrada*, therefore, the 2010 amendment applies retroactively to all judgments not yet final when it took effect.

The People argue that *Estrada*, which concerned the term for a particular offense, and *Hunter*, which concerned actual custody credits, are inapplicable to amendments that involve conduct credits because the latter are designed to encourage future good behavior, not reduce punishment for a past crime. The argument is unpersuasive. As *Doganieri* observes in rejecting the same distinction, “[u]nder *Estrada*, it must be presumed that the Legislature thought the prior system of not allowing credit for good behavior was too severe.” (*People v. Doganieri, supra*, 86 Cal.App.3d at p. 240; accord, *People v. Brown, supra*, 182 Cal.App.4th at p. 1362; *People v. Landon, supra*, 183 Cal.App.4th at pp. 1107-1108; but see *People v. Rodriguez, supra*, 182 Cal.App.4th at pp. 541-543, *contra*.)

In re Stinnette (1979) 94 Cal.App.3d 800 does not support the People’s strained insistence that the legislative intent behind the amendment was limited to “incentiviz[ing] good behavior” (and, perhaps, thereby achieving budgetary savings). *Stinnette* concerns a provision of the 1977 Determinate Sentencing Act that allowed prisoners to earn conduct credits. As explained in *Landon*, “the [Determinate Sentencing Act] expressly provided for prospective application and therefore the issue before the court was whether this prospective application violated equal protection. [Citation.] The court concluded it did not. [Citation.] The amendment to *section 4019*, unlike the amendment in *Stinnette*, does not specify the Legislature’s intent regarding its retroactive or prospective application and therefore *Stinnette* is not relevant to determining the Legislature’s intent when amending *section 4019*.” (*People v. Landon, supra*, 183 Cal.App.4th at p. 1107.) We agree. *Stinnette*’s conclusion that promoting good conduct among prisoners is a rational basis for the explicit legislative decision to give the Determinate Sentencing Act only prospective effect tells us nothing about the Legislature’s intent in amending section

4019. Moreover, while the People urge that the legislative aims underlying the amendment were those of encouraging good behavior and addressing the state's fiscal crisis, those aims are entirely compatible with that of reducing punishment for particular categories of prisoners.

Here, the trial court awarded defendant 176 days of actual presentence custody credit and 88 days of presentence conduct credit, for a total of 264 days. Under the amended version of section 4019, which we hold applies retroactively, defendant is entitled to an additional 88 days of conduct credit, for a total of 352 days (176 actual days in custody and 176 conduct credits).

DISPOSITION

The trial court is directed to prepare an amended abstract of judgment reflecting an additional 88 days of presentence conduct credit for a total custody credit of 352 days, and to forward a certified copy of the amended abstract to the California Department of Corrections and Rehabilitation. As amended, the judgment is affirmed.

Siggins, J.

We concur:

McGuinness, P.J.

Jenkins, J.